FILE COPY

JAMES R. BROWNING, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. 806

DEPARTMENT & SPECIALTY STORE EMPLOYEES' UNION, LOCAL 1265; R.C.I.A., AFL-CIO,

Petitioner,

vs.

GERALD A. BROWN, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

ROLAND C. DAVIS,
420 Balfour Building,
San Francisco 4, California,

S. G. LIPPMAN,
DeSales Building,
Washington 6, D. C.,

Attorneys for Petitioner.

CARROLL, DAVIS, BURDICK & McDONOUGH,
ROBERT P. COWELL,
420 Balfour Building, San Francisco 4, California,

Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement of the case	3
Reasons for allowance of writ	8
1. If respondent's action in this case is allowed to stand, the purely free speech aspects of picketing, recognized and carefully guarded by this court and by Congress, will suffer serious erosion through denial of administrative due process	8
2. The National Labor Relations Board, by adopting and enforcing administrative rules and regulations in conflict with the Act is acting in excess of its statutory authority so as to deprive petitioner of rights guaranteed and protected by law	18
3. The lower courts departed from the accepted course of judicial proceedings by not regarding the admitted facts of the complaint as determinative of the issues presented	22
4. This is a case of first impression involving construction of an Act of Congress dealing with questions of free speech and picketing, the solution of which is of vital importance to the sound administration of the National Labor Relations Policy	23
Conclusion	24

Table of Authorities Cited

Cases	Pages
Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293	8
Building Service Employees International Union v. Gazzam, 339 U.S. 532	8
Dixie Lou Frocks, Inc., 117 NLRB 1583	16
Garner v. Teamsters Union, 346 U.S. 485	17, 19
Hughes v. Superior Court, 339 U.S. 460	8
Inland Empire District Council v. Millis, 325 U.S. 697	15, 16
Int. Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957)	8
Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123	14, 22
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682	23
Leedom v. Kyne, 358 U.S. 184	23
Local Union No. 10, A.F. of L. v. Graham, 345 U.S. 192	9
NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675	8
NLRB v. Drivers Local 639, 80 S.Ct. 706 (1960)	8, 11
NLRB v. Prettyman, 117 F. 2d 786	17
NLRB v. United Brotherhood of Carpenters, 261 F. 2d 166	19
New York Shipbuilding Corp., 89 NLRB 915	16
Peters v. Hobby, 349 U.S. 331	17, 18
Thornhill v. Alabama, 310 U.S. 88 (1940)	8

Statutes

Labor Management Relations Act of 1947:	
Section 7	15
Section 8(b)(7)	6, 19, 20, 22
Section 8(b)(7)(B)	7, 12, 14, 18
Section 8(b)(7)(C)	3, 4, 5, 9, 11, 12, 13, 14, 20, 21, 22
Section 9(c)	20
Section 9(c)(1)	19
Section 10	19, 20
Section 10(b)	2, 5, 13

	Pages
28 U.S.C.:	
Section 1254(1)	2
29 U.S.C.A. (73 Stat. 544):	
Section 158(b)(7)	3
Section 158(b)(7)(C)	4, 9
Section 159(c)(1)	3
Section 159(c)(3)	15
Section 160(b)	2, 3
Section 160(l)	3

Rules

Rules of the Supreme Court:	
Rule 19.1(b)	2

Texts

Duffy, The New Section 8(b)(7), 69 Yale Law Journal, 1393, 1395	23
Jenkins, Retail Merchant, Picket Line and NLRB, 36 Texas L. Rev. 594, 602	10
Williams, 38 Texas Law Rev. 373	24
105 Daily Congressional Record:	
1377	21
1382, 1383-1384	21
5360	10
5446, 5694, 5966, 5968, 12790, 13902	10
14359-14362	10
16413	11
13 NLRB Ann. Rep. 20	16
14 NLRB Ann. Rep. 25 (1949)	18
21 NLRB Ann. Rep. 73 (1956)	18
Senate Committee Analysis, Subcommittee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess, 1959, pp. 20-21	12
Sen. Resolution 181, 105 Daily Cong. Rec. 15907	12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No.

DEPARTMENT & SPECIALTY STORE EMPLOYEES' UNION, LOCAL 1265, R.C.I.A., AFL-CIO,
Petitioner,

vs.

GERALD A. BROWN, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause November 15, 1960.

OPINIONS BELOW

The opinion of Kilkenny, J. for the Court of Appeals for the Ninth Circuit rendered November 15, 1960 and the order of the Court clarifying the aforesaid opinion in response to respondent's petition for clarification and modification of the opinion (Appendix A, p. i) is reported in 284 F. 2d 619. The opinion of Wollenberg, J. of the Federal District Court, Northern District of California, Southern Division, rendered March 23, 1960 (Appendix A, p. xxxi) is reported in 187 F. Supp. 865.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1960 (Appendix A, p. xxx). The order of this Court extending the time within which to petition for certiorari to March 14, 1961 was entered February 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Rule 19.1(b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board or its delegatees, like respondent, are free to disregard the hearing procedures of Section 10(b) of the National Labor Relations Act, as amended (73 Stat. 544, 29 U.S.C. §160(b)) by making an ex parte determination, absent any hearing, that the conduct engaged in

by petitioner and the object thereof constitute proscribed activity under Section 8(b)(7)(C) of said Act.

2. Whether the requirements of due process require a hearing at some stage of the administrative proceeding in which the action is taken and the decision made, and whether in the instant case, such hearing must precede any attempted order for the type of election provided for in Section 8(b)(7)(C) of the Act.

3. Whether the admitted facts of the complaint affirmatively establish the jurisdiction of the District Court to hear and decide the issues presented.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (29 U.S.C. §158(b)(7), 159(c)(1), and 160 (b)(1) are printed in Appendix B hereto, p. xxxiii.

STATEMENT OF THE CASE

The facts of this case are entirely uncontroverted since the District Court granted respondent's motion to dismiss the complaint without any affidavits being submitted by respondent in support of his motion or any denial by answer being made to the complaint.

On February 5, 1960, petitioner sent a letter (Exhibit "A", R. 13-14) to the G. R. Kinney Co., Inc., (hereinafter sometimes referred to as Kinney), a re-

tail shoe establishment, advising Kinney that the Union intended to truthfully advertise to the public that Kinney was not operating its establishment under fair Union conditions, and thereby to urge the public to patronize stores where Union members were employed.

At the same time petitioner disclaimed any interest in organizing the employees and in fact announced its refusal to enter into contractual relations with Kinney. Thereafter in pursuance of and consistent with said purposes, petitioner caused certain persons displaying placards and passing out leaflets (Exhibit B, R. 14-15) to be placed in front of the Kinney store.

At no time did petitioner demand recognition from Kinney, or demand that the company execute a collective bargaining agreement with petitioner, nor did petitioner seek to represent the Kinney employees or to require said employees to designate petitioner as their collective bargaining representative. Throughout the course of this advertising campaign, petitioner had not induced or caused any individual in the course of his employment to refuse to pick up, deliver or transport any goods or to refuse to perform any services for Kinney (R. 5-6).

Despite the above facts, however, on February 17, 1960, Kinney filed with respondent an unfair labor practice charge alleging that petitioner was picketing its stores in violation of §8(b)(7)(C) of the National Labor Relations Act of 1947, as amended (73 Stat. 544, 29 U.S.C. §158(b)(7)(C)), together with a repre-

sentation petition asking that an election be conducted to determine whether the employees of Kinney wished to be represented by the Union (R. 16-17). This charge asserted that the picketing and advertising had as an object forcing or requiring the employer to recognize or bargain with petitioner and/or requiring the employees of the employer to accept or select petitioner as their collective bargaining representative.

On March 10, 1960, respondent, Regional Director of the National Labor Relations Board for the Twentieth Region, notified petitioner that he was dismissing the unfair labor practice charge (Exhibit "F", R. 21), but that he was nonetheless proceeding to hold the requested election on March 14, 1960, purporting to act under the provisions of the then dismissed charge (Exhibits "H", "I", "G", R. 24-27).

Petitioner thereupon immediately demanded that it be afforded a hearing with the opportunity of confrontation and cross-examination on any charges and asserted, inter alia, that respondent was proceeding in excess of his statutory authority by making an ex parte adjudication and order on said dismissed charge and petition, that the election procedures of Section 8(b)(7)(C) can only be utilized when an unfair labor practice within the meaning of said section had been found to exist pursuant to Section 10(b) of said Act. Petitioner's demand was refused and it was further denied relief, without opinion, on application to the National Labor Relations Board (Complaint, Par. xi, R. 8-9).

Having exhausted its administrative remedies as aforesaid, petitioner filed the instant complaint in the District Court to stay any and all acts and orders of respondent in proceeding to order the holding of the aforesaid election until and unless respondent complied with the notice and hearing procedures of the Act.

The District Court, after a full hearing on an order to show cause, at which respondent was represented by counsel, and after the law was fully argued, agreed with petitioner's position and issued a temporary restraining order enjoining respondent from holding the aforesaid election (R. 29, 34).

Thereafter, respondent moved to dismiss the complaint on the grounds that the Court was without jurisdiction of the subject matter; that the holding of the election would not result in such injury as warrants the granting of injunctive relief and that the complaint failed to state a cause of action. At the hearing thereon, the District Court reversed its prior ruling and dismissed the complaint on the sole ground that "plaintiff has failed to establish the jurisdiction of this court, in that it fails to allege facts constituting a violation of the National Labor Relations Act or a derogation of plaintiff's right to free speech under the Constitution of the United States." (R. 46)

The Court of Appeals for the Ninth Circuit affirmed the District Court judgment essentially on the ground that Section 8(b)(7) applies equally to unfair labor

practices and representation elections; that Congress, by eliminating a hearing under the representation phase thereof, did not intend to substitute the unfair practice hearing procedures of Section 10 for the deleted representation hearing; and further, that the Board's provision in its rules and regulations for a subsequent hearing on objections to the conduct of the election, satisfies any requirement of due process. However, when respondent himself petitioned for clarification and modification of the Court's opinion on the ground that the Board's rules do not, in fact, provide for such a hearing in connection with the basic charge, the Court modified its opinion to state that due process rights were nevertheless substantially complied with, not by holding a hearing at any stage of either the unfair labor practice complaint or the representation petition which precipitated the subject election, but because respondent would be afforded a hearing on these facts in connection with any future adjudication under another and different charge, to wit, violation of 8(b)(7)(B). (Appendix A, p. xxvii.)

Jurisdiction of the District Court was invoked because a question arises under a law relating to commerce, the National Labor Relations Act.

REASONS FOR ALLOWANCE OF WRIT

1. IF RESPONDENT'S ACTION IN THIS CASE IS ALLOWED TO STAND, THE PURELY FREE SPEECH ASPECTS OF PICKETING, RECOGNIZED AND CAREFULLY GUARDED BY THIS COURT AND BY CONGRESS, WILL SUFFER SERIOUS EROSION THROUGH DENIAL OF ADMINISTRATIVE DUE PROCESS.

In the development of its doctrines regarding picketing as a form of communication, this Court has consistently been guided by the principle that the right to regulate picketing is conditioned by the lawfulness of the object thereof, and the justification for any interference with picketing must be predicated on a finding that the object sought is illegal. (See e.g. *Int. Brotherhod of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 294-295; *Building Service Employees International Union v. Gazzam*, 339 U.S. 532.)

While the Court has stated that picketing is "something more and different" than free speech (*Hughes v. Superior Court*, 339 U.S. 460, 464) and has condemned certain picketing which acts as a *signal* to others to engage in unlawful activity, (*NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 690), the Court has never subscribed to the theory that picketing is inherently coercive and the Court has rejected this approach on principles akin to those involved in this case. (*NLRB v. Drivers Local Union*, 362 U.S. 274, 291.)

Thus, on many occasions, the Court and its individual members have spoken out against attempts to interfere with legitimate picketing activity. (See e.g. *Thornhill v. Alabama*, 310 U.S. 88; *Cafeteria Em-*

ployees Union, Local 302 v. Angelos, 320 U.S. 293.) Especially appropriate to the instant case are the remarks of Mr. Justice Douglas, dissenting in *Local Union No. 10, A.F. of L. v. Graham*, 345 U.S. 192, 202:

> "But if the Union did no more than advertise to Union men and Union sympathizers that non-union men were employed on the job, the picketing would be privileged."

As recognized by this Court and by all authorities in this field of the law, it is possible to draw a definite line between the "signal" type of picketing for an unlawful objective, which bases its appeal in large measure on the conditioned and concerted response of workingmen in refusing to cross a picket line, and the advertising or informational picket line which makes no attempt to halt deliveries or require withdrawal of services of the employees, but rather whose appeal must stand or fall on the public reaction to the cause espoused and the persuasiveness of that appeal. In this latter situation, the equation of picketing with speech reaches its closest balance.

It is clear that Congress drew the same lines of demarcation in enacting the statute here in question: Section 8(b)(7)(C) of the National Labor Relations Act, as amended (73 Stat. 544, 29 U.S.C. §158(b)(7)(C)), (Appendix B).

A thorough understanding of this complex legislation and the reasons prompting the filing of the instant suit cannot be had without detailing to some extent the circumstances surrounding Congress' considera-

tion of the statute. The extent of the public demand for appropriate legislation in the labor relations field caused the then Senator Kennedy, co-sponsor and floor leader of the Senate-reported bill to comment, "the bill which is before us has received more extensive and concentrated attention by a larger number of people than any recent legislative proposal with which I am familiar." (105 Daily Cong. Rec. 5360.)

In no small measure was this interest engendered by public concern and apparent resentment over the use of recognitional and organizational picketing in certain situations which were equated on the floor of Congress and in newspaper editorials and other media with "blackmail" and "extortion." (See e.g. 105 Daily Cong. Rec. 5446, 5694, 5968, 12790, 13902 (Jenkins, *Retail Merchant, Picket Line and NLRB*, 36 Texas L. Rev. 594, 602.)

Despite the public hysteria, however, many legislators refused to be swept into legislation by label and attempted to point out to Congress the fundamental freedoms from which stemmed the exercise of such concerted action by workingmen, their recognition in the decisions of this Court, and to bring home the realization that in attempting to prohibit certain picketing care must be utilized to protect purely informational picketing, in view of the free speech aspects involved. (See e.g. 105 Daily Cong. Rec. 5966, 14359-14362.)

As this Court has pointed out, the result was an enactment which "while proscribing peaceful organi-

zational strikes in many situations, . . . also establishes safeguards against the Board's interference with legitimate picketing activity." (*NLRB v. Drivers Local Union*, supra, at 291.) The final result and the effect of the protective amendments adopted were explained by Senator Kennedy:

> "However, in the 12 days during which the conference met the majority of the Senate conferees secured important changes in the restrictive provisions of the Landrum-Griffin bill, thereby protecting traditional and essential rights of workingmen seeking to improve conditions of employment. It is important that the Senate should note these changes.
>
> * * * * * * *
>
> "Second. Organizational Picketing: The House bill would have forbidden virtually all organizational picketing, even though the pickets did not stop truck deliveries or exercise economic coercion . . . When the picketing results in economic pressure through the refusal of other employees to cross the picket line, the bill would require a prompt election. Purely informational picketing cannot be curtailed under the conference report, although even this privilege would have been denied by the Landrum-Griffin measure." (105 Daily Cong. Rec. 16413.)

As the legislative history of the statute discloses, (Appendix C, p. xxxviii), all the disputing legislators agreed on one proposition, that *the electoral procedures provided in Section 8(b)(7)(C) were not available unless there was a stoppage of deliveries or a refusal to perform services induced by the picket-*

ing activity. (See also Sen. Resolution 181, 105 Daily Cong. Rec. 15907; Senate Committee Analysis, Subcommittee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess. 1959, pp. 20-21.)

In the instant case, however, respondent disregarded the admitted fact that there was no stoppage of work or deliveries, by reason of petitioner's activity, or otherwise, and refused to hold a hearing to determine whether petitioner's picketing was embraced within the protective proviso in Section 8(b)(7)(C). Such a hearing, by the language of the statute and its legislative history, would have quickly demonstrated that the election procedure was neither available nor applicable to the facts of this case. Nevertheless, the respondent proceeded to order an election, thereby setting in motion the further procedures under the Act which can lead to a prohibition of all picketing under another section of the new law, to wit, Section 8(b)(7)(B). This action on the part of respondent, petitioner contended to the lower courts, was in excess of respondent's statutory authority, operated to deny it due process of law, had the effect of interfering with petitioner's lawful activity, and seriously prejudiced the response petitioner sought from its public appeal.

Petitioner is confirmed in its view and that the lower courts erred in their determination of this important question by a consideration not only of the prescribed statutory procedure in unfair labor practice cases, but also by the damaging practical effect of respondent's decision and action upon the Union,

its case with the general public and its future relationship with the employer's employees. By an examination of these factors, the impact of respondent's course of conduct on due process becomes apparent.

By a summary, ex parte action a determination was made that petitioner's activities were prohibited rather than protected under the Act, and thereby that they were subject to the application of the electoral procedures of the unfair labor practice section, to wit, Section 8(b)(7)(C). In the face of this action by respondent, as to which petitioner was without recourse, it had no choice, if it was to maintain the integrity of its purely informational or advertising objectives until a decision was reached, but to refrain from participating in the election or from even approaching the employees with campaign literature. To do otherwise would have immediately resulted in a radical change from the purely informational quality of its picketing activity to a proscribed organizational drive. Petitioner was thus left with the "Hobson's choice" of engaging in prohibited organizational activity or allowing the employees to hear only one side of the story through the employer's propaganda, thereby assuredly losing the unwanted election. In either case, the Union is effectively severed from the protections of the Section 8(b)(7)(C) proviso without a hearing being obtained at any stage of this proceeding. This result could not be obtained were respondent required to make a determination on a record, after hearing, in conformity with Section 10 (b), since in that case there would be a binding adjudi-

cation that its conduct was either prohibited or protected.

It is not merely the loss of an election it never sought that faces the Union in such a situation, but rather the loss in effectiveness of its appeal. Since informational picketing depends for its impact not on withdrawal of services, but on convincing the public and enlisting their support and concurrence, the Union must create a favorable climate of public opinion which is receptive to the Union's desired objectives. However, as pointed out above, public opinion has been conditioned against picketing engaged in by a minority or stranger union. Thus, the publication of the results of an election in which the Union did not participate tends to impair the exercise of petitioner's right of free speech by making it appear that petitioner is engaging in the very activity which is the subject of public resentment. Like the situation in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 161, 174, this is not an instance of merely defamatory name calling, *but an adjudication of status*, and such an adjudication is made in the complete absence of due process. Thus the Union is made to suffer the humiliation and public prejudice of a lost election (not to mention the later statutory consequences under Section 8(b)(7)(B)), even though the Union's conduct was specifically instulated from sanctions by the exclusionary proviso of Section 8(b)(7)(C). The Union's right to picket for informational purposes without being forced to participate in an election to insure that right is basic and it was

recognized as such by Congress. It was in derogation of this important right that respondent acted in this case.

A further ramification of respondent's action is its ultimate effect on rights of the employer's employees under the law. The Union had unequivocally disclaimed any right or desire to represent the employees (R. 13-14). Nevertheless, by the summary methods employed by respondent in ordering an election without the consent of the employees or any other party, these employees are precluded, without recourse, for a twelve month period from the right to select any collective bargaining representative, whether it be petitioner or some other Union. (29 U.S.C. §159(c)(3).) Thus, by an arbitrary decision by one man, without color of due process, there is permitted to occur a serious invasion of the basic right guaranteed by Section 7 of the Act—the free selection of a collective bargaining agent.

The Court of Appeals put the above considerations to one side with the sweeping pronouncement that due process contentions were satisfied by the Board's rules providing for a hearing on objections to the conduct of the election after the same had been held, specifically relying upon this Court's decision in *Inland Empire District Council v. Millis,* 325 U.S. 697. However, respondent, himself, in petitioning for clarification and modification of the opinion, was forced to disagree with the Court as to the scope of the Board's rules and admit that, in fact, these rules make no such provision for a hearing on the crucial

issue of the object of petitioner's activity. The Court at respondent's request then switched its basic rationale and held in the "clarified" opinion, without stating any reason therefor, that, in any case, due process considerations could be put aside until such time as another and different unfair labor practice charge, based upon another Section of the Act and flowing only from the results of the election, might be filed against petitioner.

The posture of this case, is, then, that there has been a final dismissal of the employer's unfair labor practice charge (See e.g. *Dixie Lou Frocks, Inc.*, 117 NLRB 1583; *New York Shipbuilding Corp.*, 89 NLRB 915), an adjudicative determination of status that petitioner's activity had a proscribed object subjecting it to an election, and finally, the election itself terminating the administrative action (13 NLRB Ann. Rep. 20). All of these results, which seriously prejudice both petitioner and the employees, were accomplished without a hearing on any of the issues presented. Under such circumstances, *Inland Empire District Council v. Millis*, supra, provides no ground for reliance, since this Court specifically left open the question now presented by petitioner, stating:

> "We need not determine whether in a situation where no hearing whatever is afforded prior to an election, the failure would be cured by allowing one afterward, whether as a matter of compliance with the statute or with the regulations. That situation is not presented. The proceedings in this case prior to the election afforded op-

portunity for hearing. At most the hearing was defective, and the opportunity given by the post election hearing was effective to cure whatever defects may have exisited, if any." (*Id.* at p. 709, fn. 13.)

Petitioner respectfully submits that this, therefore, is the very type of case in which this court is required to reach the question of whether motive, intent or objective in unfair labor practice proceedings are capable of resolution only after hearing (See e.g. *Garner v. Teamsters Union,* 346 U.S. 485, 489-490; *NLRB v. Prettyman,* 117 F. 2d 786, 790) or whether such a decision may result from ex parte administrative fiat (But cf. *Peters v. Hobby,* 349 U.S. 331, 345).

It is significant that in the only decision available on this proposition a Trial Examiner of the NLRB has specifically repudiated respondent's position:

"I do agree that a serious question of due process is posed unless the facts upon which a Regional Director finds an election under Section 8(b)(7)(C) is warranted may be put in issue in a formal hearing . . . *To hold that a Regional Director may deprive a respondent union of such exemption as the second proviso affords by directing an election,* dismissing the 8(b)(7)(C) action, and subsequently issuing a complaint under subparagraph (B) *would appear to sacrifice due process to administrative legerdemain, a sacrifice I do not anticipate the Courts will view with favor."* (Emphasis added) *Department & Specialty Store Employees Union, Local 1265,* Case No. 20-CP-12, p. 6, decision announced September 21, 1960.

While respondent argued to the lower courts that petitioner would be afforded a hearing on its objective when, as and if another charge *under Section* 8(*b*)(7)(*B*) might be filed, the Board's rules do not so expressly provide, and, in fact, such a contention is directly contrary to the existing Board procedure in giving administrative finality to certified election results and refusing to re-examine the circumstances thereof (See e.g. 14 NLRB Ann. Rep. 25 (1949); 21 NLRB Ann. Rep. 73 (1956)).

---

2. THE NATIONAL LABOR RELATIONS BOARD, BY ADOPTING AND ENFORCING ADMINISTRATIVE RULES AND REGULATIONS IN CONFLICT WITH THE ACT IS ACTING IN EXCESS OF ITS STATUTORY AUTHORITY SO AS TO DEPRIVE PETITIONER OF RIGHTS GUARANTEED AND PROTECTED BY LAW.

Aside from the substantial questions of due process adverted to above, this case poses a serious question of agency action taken in excess of statutory authority. It is settled law that where a procedural method or operation is already detailed by a statute, administrative agencies and their delegatees, like respondent, are not free to ignore such procedures and invest themselves with authority to follow other practices (See *Peters v. Hobby*, 349 U.S. 331, 345).

In this case, respondent took the position before the lower courts that he was merely following the National Labor Relations Board's Rules and Regulations (R. 41-45) in proceeding to make a summary

determination, on grounds unknown and undisclosed to petitioner, that petitioner's conduct constituted an unfair labor practice in that an object of its activity was for a purpose prohibited by Section 8(b)(7) of the Act. However, it is established that there is only one method prescribed for adjudicating unfair labor practice charges and that method is specified in detail in Section 10 of the Act itself, thereby occupying the field to the exclusion of any contrary rules which respondent purported to follow. (See e.g. *Garner v. Teamsters Union*, 346 U.S. 485, 489-490; *NLRB v. United Brotherhood of Carpenters*, 261 F. 2d 166.)

The Court of Appeals apparently believed that the Board was free to make its own rules in handling alleged violations of Section 8(b)(7) since it stated,

> "since the Congress eliminated the procedure set up under §9(c)(1), we must assume it intended that the Board would make rules and regulations establishing its own election procedure." (Appendix A, p. xvi.)

This is an assumption petitioner contends is unjustified and one which entirely misconceives the statutory prerequisites to utilizing any "election procedure." The only hearing which would otherwise be required by the "eliminated" Section 9(c)(1), if the election petition were not to be processed as part of an unfair labor practice, is concerned solely with the questions which typically arise in connection with a representation election, such as appropriate bargaining unit, voter eligibility and the conduct of the bal-

loting. By "eliminating" such questions it does not follow that Congress also eliminated the necessity for finding the commission of an unfair labor practice as a prerequisite to the utilization of the election procedure contained in Section 8(b)(7)(C). Without such a prerequisite finding of an unfair labor practice, the section becomes almost meaningless, because, in the absence of this condition precedent, all of the requirements of Section 9(c) of the Act become applicable to the election petition. To give any effect at all to Congressional intent in construing Section 8(b)(7)(C) such a conclusion seems inescapable.

It is petitioner's contention that the Court of Appeals in attempting to draw a parallel between two elements which are not comparative equals departed from the basic standards of statutory construction. Petitioner's position in this regard follows from the wording of that part of Section 8(b)(7)(C) upon which respondent purported to rely in ordering the instant election. It is of the utmost significance that this section provides that "where *such picketing* has been conducted" the Board shall proceed to an expedited election. This language requires a prior determination that any picketing activity engaged in by petitioner was *such picketing* as constitutes an unfair labor practice under Section 8(b)(7). There is only one method provided by Congress for determining whether the picketing was a proscribed activity and that method under Section 10 leaves no room for ex parte determinations by respondent.

The proviso to Section 8(b)(7)(C) specifically provides a fundamental area of protected activity which petitioner submits this Court should be unwilling to overlook as was done in the lower courts.

> "*Nothing* in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization . . ." (Emphasis added.)

Since the electoral machinery under which respondent purported to act is itself contained in subparagraph (C), it is imperative that an adjudication be made that petitioner's activities were not in fact encompassed in the proviso; otherwise the electoral procedure is capable of being utilized to prohibit informational picketing in direct contravention of the statute. A specific intention has been shown by the Congress to remove this type of picketing from the sanctions of the entire section, including the election procedures therein contained. (See 105 Daily Cong. Rec. 1377, S. Res. 181, 105 Daily Cong. Rec. 1382, 1383-1384.) The procedure followed by respondent in this case is, thus, an attempt at administrative amendment of a Congressional enactment.

3. THE LOWER COURTS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY NOT REGARDING THE ADMITTED FACTS OF THE COMPLAINT AS DETERMINATIVE OF THE ISSUES PRESENTED.

While the opinion of the Court of Appeals purports to state that "the consideration of the Court is limited to matters appearing on the face of the proceedings," the Court neglects to find or, as the course of its opinion reflects, to be bound by the fact that on a motion to dismiss the allegations of the complaint are taken as admitted. (See e.g. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 126.)

As the statement of facts, supra, shows, each of the prohibited objectives under Section 8(b)(7) is expressly disavowed and denied in the verified complaint which was filed herein. It must follow, therefore, that in considering the efficacy of respondent's motion to dismiss the complaint, the lower courts were obliged to accept the proposition that any picketing activity engaged in by petitioner was not "such picketing" as is referred to and prohibited by Section 8(b)(7)(C) of the Act, and further, that petitioner's exclusive purpose in such picketing was, in fact, to truthfully inform the public that Kinney did not have a union contract and that its employees were not union members.

The admitted facts would place petitioner's activities within the protected area of the proviso to Section 8(b)(7)(C), and respondent would derive no authority therefrom to take any action whatever under that section. Accordingly, petitioner submits that the

complaint properly alleges a case where an agent of the federal government is purporting to act in excess of his statutory authority and the District Court had jurisdiction to enjoin such agency action. (See e.g. *Leedom v. Kyne*, 358 U.S. 184; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701-702)

---

4. THIS IS A CASE OF FIRST IMPRESSION INVOLVING CONSTRUCTION OF AN ACT OF CONGRESS DEALING WITH QUESTIONS OF FREE SPEECH AND PICKETING, THE SOLUTION OF WHICH IS OF VITAL IMPORTANCE TO THE SOUND ADMINISTRATION OF THE NATIONAL LABOR RELATIONS POLICY.

As this petitioner has attempted to set forth, the instant problem is not susceptible to easy resolution and it deals with one of the most complex provisions in the entire labor law field. (Duffy, *The New Section 8(b)(7)*, 69 Yale Law Journal, 1393, 1395). The attempts of Congress to balance the industrial equation while at the same time preserving the "traditional and essential rights of workingmen" have been pointed out. This is a case involving novel questions in which it must be considered whether the will of Congress and the warnings of this Court have been fairly heeded or lightly ignored in derogation of fundamental rights of free speech and due process. The determination of the proper course of administrative process, and the answer to whether those rights were effectively preserved must depend on this Court's determination of the questions presented. Until this Court's construction of the enactment is given, Regional Directors of

the Board, like respondent, will continue to follow the Board's Rules and Regulations which permit these ex parte procedures. In this manner the protective statutory provisions will have been effectively amended by administrative action to such an extent that informational picketing will, as one writer has stated, become "freedom to speak—but only ineffectively." (Williams, 38 Texas Law Rev. 373.)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
March 14, 1961.

Respectfully submitted,
ROLAND C. DAVIS,
S. G. LIPPMAN,
Attorneys for Petitioner.

CARROLL, DAVIS, BURDICK & MCDONOUGH,
ROBERT P. COWELL,
Of Counsel.

(Appendices A, B and C Follow.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Department & Specialty Store Employees' Union, Local 1265, R.C.I.A. AFL-CIO, Appellant, vs. Gerald A. Brown, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Appellee.	No. 16,843 Nov. 15, 1960

Before: Merrill and Koelsch, Circuit Judges, and Kilkenny, District Judge.

Kilkenny, District Judge:

Appeal from an order of the United States District Court for the Northern District of California, Southern Division, dismissing appellant's complaint asking for an injunction against the representation election directed by appellee Regional Director of the National Labor Relations Board[1] pursuant to the provisions of §8(b)(7)(C) of the National Labor Relations Act,[2] as amended, (73 Stat. 544, 29 U.S.C. §158(b)(7)(C)). The following facts appear in the complaint:

[1]hereinafter called "Board"

[2]hereinafter called "Act"

On February 4, 1960, appellant union directed a letter to G. R. Kinney Co., Inc.[3] which operates a retail shoe store in Oakland, California, which letter[4] stated that appellant "intends to engage in an advertising campaign to inform the public that your store does not operate under fair union conditions" and that appellant did "not claim at this time to represent a majority of the employees of your store" and that it was not appellant's intention "to secure a union contract . . . until and unless a majority of your employees at your store voluntarily without any coercion of any kind, designate the union as their collective bargaining representative." The next day appellant caused a picket line to be formed in front of the Kinney store, the pickets carrying signs reading, "This store does not operate under AFL-CIO union conditions. Please do not patronize, Department & Specialty Store Employees' Union, Local 1265." Cer-

---

[3]hereinafter called "Kinney"

[4]"This is to notify you that our Union intends to engage in an advertising campaign to inform the public that your store does not operate under fair Union conditions.

"In this advertising campaign it is our exclusive purpose to persuade the public not to patronize your company and to urge that members of the public shop in retail stores where our Union members are employed under Union conditions.

"We do not claim at this time to represent a majority of the employees of your store, nor it is any part of the purpose of our advertising campaign to secure a Union contract covering these employees. In fact, our Union will refuse to enter into any such contract until and unless a majority of your employees at your store voluntarily without any coercion of any kind designate the Union as their collective bargaining representative.

"Any statements heretofore made to you which can be construed as inconsistent with this communication are hereby unconditionally withdrawn and specifically repudiated.

"Yours very truly,"

tain leaflets[5] were distributed by the pickets to passersby which stated, inter alia, "the employees of this store do not enjoy union wages, hours and other working conditions" and that, "your patronage breaks down . . . fair wages and working conditions which prevail in union stores and threatens the jobs of our members at those stores."

A copy of each of these documents was attached to and made part of the appellant's complaint. On February 17, 1960 Kinney filed with appellee an unfair labor practice charge[6] alleging that the Union was picketing its store in violation of §8(b)(7) of the Act,

---

[5] "Local 1265, Department & Specialty Store Employees' Union, Chartered by Retail Clerks International Association, AFL-CIO, Suite 109, 1444 Webster Street, Oakland 12, California, TEmplebar 2-3823

A MESSAGE TO THE PUBLIC

"The employees of this store do not enjoy Union wages, hours and other working conditions, nor do they have the advantage of the many other benefits of Union membership, such as union-negotiated medical and hospital benefits and the like.

"This store and the employees who work here are in competition with the many other fair Union stores in the area where Union conditions prevail for the members of our Union. Your patronage of this store breaks down these fair wages and working conditions which prevail in Union stores and threatens the jobs of our members at those stores.

"Our members are your friends and neighbors who have obtained Union conditions and job security through their Union. By their efforts your living standards and your security are likewise protected.

"We are sure that you will not wish to harm these many hundreds of our members in the community by giving your patronage to this store and its employees who do not meet Union standards. We seek your help in maintaining and improving these standards.

"Please Do Not Patronize Kinney's

Department & Specialty Store Employees' Union, Local 1265 R.C.I.A., AFL-CIO"

[6] See Appendix 1.

and a representation petition[7] asking that an election be conducted to determine whether the employees of Kinney wished to be represented by the Union. This charge asserted that the picketing and advertising had as an object forcing or requiring the employer to recognize or bargain with appellant and/or forcing or requiring the employees of the employer to accept or select appellant as their collective bargaining representative.

The Regional Director investigated the charges. Upon the basis of this investigation he concluded that the picketing was for objects condemned by §8(b)(7) and within the meaning of subparagraph (C); that the representation petition had been filed within a reasonable period of time from the commencement of the picketing and that the picketing raised no questions which should be decided by the Board before the election. Thereupon, the Regional Director concluded that an expedited election was indicated under the first proviso to the said subparagraph (C). After arriving at this conclusion and on March 10, 1960, the Director issued a notice of election to be held on March 14th and at the same time advised the parties that no complaints would be issued on the charge[8] of unfair labor practice. Appellant then demanded that the Director hold a hearing before the election to afford it an opportunity to produce evidence that no question concerning representation existed and that

[7] See Appendix 2.

[8] See Appendix 3.

the picketing was not within the ban of §8(b)(7). This demand was denied. Appellant then applied to the Board, on the same grounds, to stay the election. This application was denied on March 11th. The complaint charges the appellee with failing to give appellant a reasonable notice of the said election, of failing to afford the appellant a full and fair hearing, of failing to give appellant an opportunity to present evidence and cross-examine witnesses, and with utilizing a procedure contrary to law and abusing his authority by acting in an arbitrary and capricious manner to deprive appellant of due process and in derogation of its Constitutional right to exercise free speech. Likewise, it is alleged that appellant never demanded recognition from Kinney or demanded that said company execute or enter into a collective bargaining agreement and at no time sought to represent or require the employees of the company to designate the appellant as their collective bargaining representative.

On the day the Board denied appellant's application, appellant instituted this suit in the District Court to enjoin the Regional Director from proceeding with the scheduled election. The Regional Director moved to dismiss the claim on the grounds that, (1) the Court was without jurisdiction over the subject matter; (2) the holding of the election would not result in such injury as warrants the granting of injunctive relief; and (3) the complaint failed to state a cause of action. The District Court allowed appel-

lee's motion and dismissed the complaint. At the same time it denied appellant's motion for a preliminary injunction.

Each of the parties have urged on the Court a number of acts which occurred subsequent to the filing of the complaint. We deem those acts of no significance in arriving at a proper decision in this case. For example, the fact that the election was conducted among Kinney's employees on April 18, 1960 in order to determine if they wanted to be represented by the appellant. The employees unanimously voted against such representation. On a motion to dismiss, the consideration of the Court is limited to matters appearing on the face of the proceedings. *Sears, Roebuck & Co. v. Metropolitan Engravers,* 9 Cir., 1956, 245 F. 2d 67; *Grand Opera Co. v. Twentieth Century-Fox Film Corporation,* 7 Cir., 1956, 235 F. 2d 303; *Emmons v. Smitt,* 6 Cir., 1945, 149 F. 2d 869, cert. den. 326 U.S. 746.

Under ordinary circumstances, the decisions of the National Labor Relations Board in representation proceedings are reviewable only in the Courts of Appeals. The District Courts have no jurisdiction unless there is a showing of unlawful action by the Board and resulting injury, by departure from statutory requirements or those of due process. *Leedom v. Kyne,* 358 U.S. 184; *Leedom v. I.B.E.W.*, D.C. Cir., 1960, 278 F. 2d 237; *National Biscuit Division v. Leedom,* D.C. Cir., 1959, 265 F. 2d 101, cert. den. 359 U.S. 1011; *Leedom v. Norwich, Connecticut Printing Spe-*

cialties Union, D.C. Cir., 1960, 275 F. 2d 628; *International Association of Tool Craftsmen v. Leedom,* D.C. Cir., 1960, 276 F.2d 514. Equitable relief is clearly barred in the wide area of decision which depends on the Board's discretion and expertise. *Leedom v. Kyne,* D.C. Cir., 1957, 249 F. 2d 490.

The finding by the agency of probable cause is merely a statutory prerequisite to proceeding with the representation election. No hearing at the preliminary stage is required by due process as long as the required hearing is held before the final administrative order becomes effective. *Ewing v. Mytinger,* 339 U.S. 594, 598.

Appellant seeks to bring itself within the exceptions to the general rule and argues that the Board departed from statutory requirements and those of due process, including freedom of speech, when it made an ex parte decision on the object of the picketing and ordered a representative election without affording the appellant an opportunity for hearing. It urges that §§8(b)(7)(C), 9(c), 10(c) and 10(l) of the Labor-Management Relations Act of 1947, as amended, (29 U.S.C. §§158, 159, 160) should be construed together and that the Board should have followed the procedure outlined in §10. That part of §8(b)(7)(C) with which we are concerned makes it an unfair labor practice for a labor organization or its agents:

> ". . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain

with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall *forthwith,* without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof; Provided further, That nothing in this subparagraph (C) shall be construed to prohibit picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his

employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

This particular provision was introduced into the Act as part of the 1959 amendment and has received little judicial interpretation. The Board took the position that §8(b)(7)(C) authorized a separate procedure and proceeded to implement it with certain rules, regulations and statements of procedure.[9] In substance these rules and statements provided that on the filing of a charge alleging that a labor organization was engaging in conduct in violation of §8(b)(7), the case would be given priority and promptly investigated and that if, after investigation, it appeared that the charge had merit, the Regional Director would issue a complaint and at that time make an application in the appropriate Federal District Court for an injunction against the picketing under §10(l) of the Act.[10] It was further provided that if the investigation disclosed a state of facts to which §8(b)(7)(C) would be applicable and that a "timely representation petition" had been filed, the Regional Director should suspend proceedings on the charge and proceed to investigate the petition. The Regional Director, by said rules and statements, is required to consider all documentary or

[9]N.L.R.B. Rules & Regulations, Statements of Procedure, Series effective Nov. 13, 1959, §§101.22, 102.73, 102.95.

[10]Rules & Regulations, §§101.2(b), 102.74.

other evidence relating to the matters and allegations set forth in the petition, no matter by whom presented. If the Regional Director decides that an election is in order and that there are no issues which would require a prior hearing, he is authorized to direct that an election be held in an appropriate unit of the employees. Any party aggrieved by the Director's direction of election may seek a review of that determination by filing a request with the Board for special permission to appeal, and the Board may, if it deems it appropriate, order a stay of such election. After the election any challenges to the ballot or objections to the conduct of the election are investigated by the Regional Director and ruled on by him. His rulings are final and binding unless the Board, on application of an aggrieved party, decides to review the Regional Director's action. The Regional Director then issues a certificate of election results, including certification of representatives where appropriate, with the same force and effect as if issued by the Board. If the Regional Director determines that an election should be held on the petition, he dismisses the unfair labor practices charge, the investigation of which has been suspended pending the investigation of the representation petitions.

An analysis of §8(b)(7) discloses that as a condition to the use of its provisions, there must be picketing and such picketing must,[11] in part, be for the purpose of forcing the employer to recognize the union

[11] probable cause

involved as a bargaining agent for his employees or to force the said employees to accept the labor organization as their collective bargaining representative. If such picketing occurs under the conditions outlined in subsection (A) or (B), or in other words, where another union has already been lawfully recognized or where there has been a valid Board election within the preceding year, a violation of said section has been established.

We now turn to the subsection in controversy on this appeal: that is, where no other union has been lawfully recognized, a valid election has not been conducted during the preceding 12-month period and picketing is being done. Subsection (C) allows such picketing to continue for a reasonable period of time not to exceed thirty days. If, during such period, a representation petition is filed, such as was filed in this case, the picketing may continue pending the outcome of the election. We now approach the language of said subsection (C), the meaning and application of which is in dispute.

The appellant earnestly contends that the hearing procedures required by §10(l) are applicable to proceedings under §8(b)(7)(C). A proper construction of §8(b)(7) makes it crystal clear that the Congress intended the section to apply to two subjects, namely: (1) unfair labor practices, and (2) representation proceedings. The principal purpose of the enactment was to declare picketing to be an unfair labor practice in the defined areas. The enactment refers to §9(c) on

two occasions and §9(c)(1), (29 U.S.C. §159(c)) on one occasion. The last mentioned section deals *only* with representation proceedings. The reference to §9 (c)(1) is in the proviso which specifically provides for an election in a representation proceeding. The petition referred to in the proviso refers back to the petition in the previous sentence, which is a petition under the representation legislation, §9(c)(1).

Separate and distinct acts govern the procedure in unfair labor practice cases and in representation cases. The procedure to be followed in the unfair labor practice cases is outlined in some detail in §10, (29 U.S.C. §160), while the procedure to be followed in ordinary representation cases is outlined in §9(c)(1), (29 U.S.C. §159). These procedures are essentially different. As an example, the General Counsel is vested with final authority in connection with the investigation of charges and the issuance of complaints under said §10. The provisions of §9(c)(1) require the Board to investigate and provide an appropriate hearing upon due notice. §8(b)(7)(C) requires the Board, in the indicated cases, to forthwith direct an election *without regard to the provisions* of §9(c)(1). If appellant's position is sound, we must interpret this legislation as eliminating the representation procedures as required by §9(c)(1) and substituting therefor the procedures as outlined in §10, which deal with unfair labor practices only and do not deal with the area of representation elections. This argument is fundamentally erroneous.

We must keep in mind that this type of legislation is remedial in character and is to be broadly and liberally construed to accomplish its intended purpose. *NLRB v. Knoxville Pub. Co.*, 6 Cir., 1942, 124 F. 2d 875; *Jeffery-DeWitt Insulator Co. v. NLRB*, 4 Cir., 1937, 91 F. 2d 134, 112 A.L.R. 948, cert. den. 302 U.S. 731. It is the judicial responsibility of the courts to find that interpretation, in this type of legislation, which can most fairly be said to be imbedded in the statute in the sense most harmonious with its theme and with the general purposes which Congress has manifested. *Local Union 219 v. NLRB*, D.C. Cir., 1959, 265 F. 2d 814. The language of the Act is not to be distorted so as to reach unintended results. *NLRB v. Texas National Gasoline Corp.*, 5 Cir. 1958, 253 F. 2d 322. In construing a statute the mischief sought to be remedied should be considered. *Fasulo v. United States*, 272 U.S. 620; *Helvering v. New York Trust Co.*, 292 U.S. 455; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, reh. den. 351 U.S. 980; *NLRB v. Lion Oil Co.*, 252 U.S. 282; *Worcester Felt Pad Corp. v. Tucson Airport Authority*, 9 Cir., 1956, 233 F. 2d 44. There is no doubt that the purpose of this legislation was to place a rather severe and drastic limitation on picketing, other than informational, and to provide for a representation election without delay.

That the Congress intended subdivision (C) to give power to the Board to hold an election without a hearing is demonstrated by the statement of Representative Barden, Chairman of the House Labor Commit-

tee.[12] Even so, the Board made provision in its rules for a hearing in the representation phase of this section in two situations.[13]

The language of a statute is the best and most reliable index of its meaning and where the language is clear and unequivocal it is decisive, unless such language does not comport with the intent and objectives of the statute when viewed as a whole. *NLRB v. Lewis*, 9 Cir., 1957, 249 F. 2d 832.

A court cannot assume any purposes of the legislature which the terms of the law do not indicate and then expunge provisions of the enactment in order to accomplish such proposed intention. *Wright v.*

---

[12]"The purpose of the proviso to paragraph (C) of section 704(C) which states that when such petition has been filed the Board shall forthwith direct an election, is to enable an employer or the employees to obtain a prompt election instead of having to go through an indefinite and prolonged period of picket line warfare which could have the effect of placing the employer's business and the jobs of his employees in jeopardy.

"Such being the problem dealt with, it was not the intent that this proviso which was added in conference, should be used as a device or subterfuge by a picketing union to bring about a pre-hearing or so-called quickie election.

"Therefore, in all cases, it will be appropriate for the Board to investigate as to whether a labor organization is using the picketing as a device simply to bring about a pre-hearing election. Where the Board has reason to believe that this is the intent of the petitioning labor organization, the Board will be under a duty to direct the petitioner to follow the provisions of Section 9(c)(1) and to afford the opportunity for a hearing. The right to a hearing is a sacred right and it should not be denied where such denial would lend support to a subterfuge."

[13]The Regional Director is authorized to order a pre-election hearing "in any case in which it appears . . . that the proceeding raises questions which should be decided by the Board before election," (§102.77(b)) and the Board may order a hearing after the election if material factual issues have been presented with respect to objections to the conduct of the election (§101.23(b)).

Blakeslee, 101 U.S. 174. Adding to a legislative enactment by inference is not favored. *Doe ex dem. Governeur's Heirs v. Robertson*, 24 U.S. 332.

Since the express words of this enactment permit the Board to call an election *forthwith* and prohibit the use of the time-consuming procedures provided by §9(c)(1), we cannot add, by implication, a requirement that the Board must proceed under the time-consuming procedures required by §10. Although statutory construction is a function of the judiciary, *Folsom v. Pearsall*, 9 Cir., 1957, 245 F. 2d 562, the interpretation as placed on that statute by the agency in charge of its administration is entitled to great weight. *Doyle v. Fox*, 9 Cir., 1956, 234 F. 2d 830; *DeSylva v. Ballentine*, 351 U.S. 570; *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264.

Section 6 of the Act,[14] (29 U.S.C. §156), gives the Board authority to make, amend and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as are necessary. While the Board may not enlarge its authority beyond the scope intended by Congress, *NLRB v. Lewis*, supra, the Board may, where restrictive intention is not shown, adopt rules and regulations to carry out its myriad functions in a manner consistent with the fulfillment of the purposes of the legislation and Congress has entrusted the Board with a wide degree of

[14] "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

discretion in the establishment of the procedure and safeguards necessary to insure fair and free elections. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330, 331; *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37; *NLRB v. Waterman S.S. Co.*, 309 U.S. 206, 226. Since the Congress eliminated the procedure set up under §9 (c)(1), we must assume it intended that the Board would make rules and regulations establishing its own election procedure under the provisions of §6. The Board so interpreted the legislation and promulgated the rules and regulations which have been previously mentioned. We have no doubt of the Board's power in this respect and hold that the rules and regulations so promulgated were a valid exercise of the Board's power.

The argument of the appellant that the Board was required to hold a hearing and make a finding under §10 that an unfair labor practice existed before it could proceed with the expedited election is basically unsound. If such construction was placed on this legislation, it would totally destroy the effect of the first proviso of subparagraph (C) and to that extent invalidate this remedial legislation. Certainly Congress did not intend to enact a vain and useless piece of legislation. It is obvious that the time required to comply with the hearing provisions of §10 would far exceed the thirty days mentioned in the first sentence of sub paragraph (C). The declared purpose of the legislation, as announced by the Chairman of the House Labor Committee, would, under such construction, be rendered nugatory. All that is required, even as a pre-

liminary to seeking an injunction, is that the Board have *reasonable cause* to believe that there has been a violation of the Act. *Bouds v. International Longshoremen's Association,* 2 Cir., 1957, 242 F. 2d 808, 810. The Board in this case could certainly find a substantial basis on evidence that the picketing had for an objective the forcing and requiring of Kinney to recognize and bargain with the appellant. True enough, the picketing may have been informational and advisory to the extent of being permissible under this legislation. This, however, is of no significance if the picketing also had as one of its objects the forcing and requiring of Kinney to recognize it as the bargaining agent of Kinney's employees. *International Brotherhood of Electrical Workers v. NLRB,* 341 U.S. 694, 704, 705; *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 689.

It is not a requirement of due process that there should be a judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are involved, that there is at some stage an opportunity for a hearing and a judicial determination. *Ewing v. Mytinger & Casselberry,* 339 U.S. 594, 599. A post-election hearing, such as here provided, is sufficient to avoid a constitutional problem. *Inland Empire District Council v. Millis,* 325 U.S. 697. Generally speaking, due process does not require a hearing at any particular time, but only before substantial rights are effected. This is true even though there is a material dispute as to the facts. *Inland Empire District Council v. Millis,* supra; *Opp Cotton Mills v. Admin-*

istrator, 312 U.S. 126, 152-153; *Bowles v. Willingham,* 321 U.S. 503, 520. The Board's rules, as previously indicated, provide an opportunity for a hearing before the appellant's right to picket may be impaired. The provision for review before the Board satisfies the requirements of due process. *Yakus v. United States,* 321 U.S. 414, 427-443; *Phillips v. Commissioner,* 283 U.S. 589, 596-597. The concept of due process is not governed by a doctrinaire scope. What is fair in one situation may be unfair in another. In the last analysis, the question is whether the ex parte procedure to which the appellant was subjected followed the rudiments of fair play. *Chicago, Milwaukee & St. Paul Rwy. v. Polt,* 232 U.S. 165, 168. The appellant insists that *Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 138, is direct authority for his position that the action of the Board and the procedure established for conducting an election without a hearing violated due process. The ex parte executive order issued in *Anti-Fascist Committee* had no legislative sanction and claimed as its authority a directive of the President of the United States. The order contained no provision for a judicial review of the ex parte order, nor for a hearing either before or after the issuance of such order. We find no comfort for appellant in that decision. *Peters v. Hobby,* 349 U.S. 331, is authority for the proposition that an agency, by regulation, cannot change, modify or abrogate a general executive order which would be in violation of a person's rights. We have already held that we are not faced with that problem in this case. Other cases cited by appellant

have received our careful consideration. All such cases can be distinguished and an analysis thereof would serve no useful purpose.

The rules and regulations promulgated by the Board do not in any way contravene the provisions of §8(b)(7)(C). The procedural provisions of §10 are not applicable. The Board did not act in contravention of the statute or of due process in holding such election. Under the circumstances, the sole and exclusive jurisdiction is with the Board and the District Court had no jurisdiction to entertain the appellant's complaint.

Affirmed.

(Endorsed:) Opinion Filed Nov. 15, 1960.
Frank H. Schmid, Clerk.

APPENDIX

1.

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR OAGANIZATION OR ITS AGENTS

* * * *

Case No. 20-CP-8. Date filed: 2-17-60

1. Labor Organization Or Its Agents Against Which Charge is Brought:

Name: Department and Specialty Store Employees Union, Local 1265, RCIA, AFL-CIO.

Address: 1444 Webster Street, Oakland 12, California.

The above-named organization or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b) Subsection (s) [Illegible] the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

Since July, 1959 and particularly February 3, 1960 and continuing to date, the above named Union threatened to, and did picket the store of the employer located at Oakland, California, interfering with deliveries and services to the store with an object thereof of forcing or requiring the employer to recognize or bargain with said union as the representative of its employees and or forcing or requiring the employees of this employer to accept or select this Union as their

collective bargaining representative although said Union is not the certified representative of the employees of this employer and no petition for election has been filed by such Union.

By the acts set forth above and by other acts and conduct, this Union interfered with, restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of said Act.

3. Name of Employer: Oakland G. R. Kinney Co., Inc.

4. Location of Plant Involved: 10323 E. 14th St., Oakland 3, California.

5. Type of Establishment: Retail Store.

6. Identify Principal Product or Service: Shoes.

7. No. of Workers Employed: 9.

8. Full name of Party Filing Charge: James B. Stuart.

9. Address of Party Filing Charge: 221 Fourth Avenue, New York, New York.

10. Tel. No.: SP 7-4500.

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Feb. 15, 1960.

/s/ By James B. Stuart,
Vice President.

2. United States of America
National Labor Relations Board

PETITION

* * * * *

Case No. 20-RM-326. Date filed: 2-17-60

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition:

* * * * *

B. (x)RM—Representation (Employer).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.

* * * * *

2. Name of Employer: Oakland G. R. Kinney Co., Inc. Employer Representative to Contact: Harold Rowen. Phone No.: LY 1-1595 (Belmont, California).

3. Address(es) of Establishment(s) Involved: 10323 East 14th Street, Oakland 3, California.

4a. Type of Establishment: Retail Store.

4b. Identify Principal Product or Service: Shoes.

5. Description of Unit Involved: Included: all employees. Excluded: supervisors as defined in the Act.

6a. Number of Employees in Unit: 9.

6b. Is This Petition Supported by 30% or More of The Employees in The Unit? [ ] Yes [ ] No.

* * * * *

8. Recognized or Certified Bargaining Agent: None. Name: None.

* * * * *

9. Date of Expiration of Current Contract, If Any: None.

* * * * *

11a. Is There Now A Strike or Picketing At The Employer's Establishment(s) Involved? Yes. X No.

11b. If So, Approximately How Many Employees Are Participating? None.

11c. The Employer Has Been Picketed By or On Behalf of Department and Specialty Store Employees Union, Local 1265, RCIA AFL-CIO, a Labor Organization of 1444 Webster Street, Oakland 12, California, Since February 5, 1960.

12. Organizations or Individuals Other Than Petitioner (And Other Than Those Named In Items 8 and 11c), Which Have Claimed Recognition As Representatives, And Other Organizations And Individuals Known To Have A Representative Interest In Any Employees In The Unit Described In Item 5 Above (If None, So State): None.

Name: None.

* * * * *

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Oakland G. R. Kinney Co., Inc.,
/s/ By James B. Stuart,
Vice President.

Address: 221 4th Avenue, New York City, New York. Telephone number: SP 7-4500.

3. National Labor Relations Board
Twentieth Region

830 Market Street, San Francisco 2, California
Telephone YUkon 6-3500

[Stamped]: Received March 10, 1960

March 9, 1960

Oakland, G. R. Kinney Co., Inc.
221 Fourth Avenue
New York City, New York

Attn: Mr. James B. Stuart, Vice President

Re: Department and Specialty Store Employees Union, Local 1265, RCIA, AFL-CIO, Case No. 20-CT-3

Gentlemen:

The above-captioned case charging a violation under Section 8(b)(7) of the National Labor Relations Act has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as a timely valid representation petition involving the employees of the employer named in the charge has been filed within a reasonable time from the commencement of the picketing described in said charge, and a determination has been made that an expedited election should be conducted upon such petition in accordance with the provisions of Sections 8(b)(7)(C) and 9(c) of said Act, and the National Labor Relations Board Rules and Regulations. A notice of such election is being issued.

I am therefore refusing to issue a complaint in this matter. Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D.C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within three (3) days from the date of service of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

/s/ Gerald A. Brown

Gerald A. Brown

Regional Director

United States Court of Appeals
for the Ninth Circuit

Department & Specialty Store Employees Union, Local 1265, a corporation, Appellant, vs. Gera'd A. Brown, Regional Director, Twentieth Region, National Labor Relations Board, Appellee.	No. 16843

ORDER

The Court having considered the appellee's petition for clarification and modification of the opinion filed in the above cause on November 15, 1960, and the Court having considered such petition and being now advised,

It Is Ordered that the language commencing on line 24, page 14 of said opinion as follows:

> "The Board's rules, as previously indicated, provide an opportunity for a hearing before the appellant's right to picket may be impaired. The provision for review before the Board satisfies the requirements of due process."

be and the same is hereby deleted.

It Is Further Ordered that the following be substituted for the material thus deleted:

> "Since §8(b)(7)(B) and the Board's rules provide an opportunity for hearing before the appellant's right to picket may be impaired, the requirements of due process are satisfied."

It is further ordered that such clarification be made in the original opinion on file herein.

Dated this 13th day of December, 1960,

/s/ Charles C. Merrill
Circuit Judge

/s/ M. Oliver Koelsch
Circuit Judge

/s/ John F. Kilkenny
District Judge

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

November 15, 1960

Roland C. Davis, Esq.,
Attorney at Law
420 Balfour Bldg.,
San Francisco, Calif.

Dear Sir:

In Case No. 16843, Dept. & Specialty Store Employees' Union, Local 1265 vs. Gerald Brown, Regional Director N.L.R.B. an Opinion was this day filed, in accordance with which a judgment or decree was filed and entered affirming judgment or decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of thirty days from the date hereof.

Very truly yours,
Frank H. Schmid,
Clerk

United States Court of Appeals
for the Ninth Circuit

No. 16,843

Department and Specialty Store Employees Union, Local 1265, a corporation,
Appellant,
vs.
Gerald A. Brown, Regional Director, 12th Region, NLRB,
Appellee.

JUDGMENT

Appeal from the United States District Court
for the Northern District of California,
Southern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof It Is Now Here Ordered and adjudged by this Court that the order of the said District Court in this cause be and hereby is affirmed.

Endorsed Judgment Filed and Entered

November 15, 1960,
Frank H. Schmid, Clerk.

ORDER DENYING PRELIMINARY INJUNCTION AND GRANTING MOTION TO DISMISS COMPLAINT

The plaintiff complains herein that defendant, Regional Director of the National Labor Relations Board, in ordering a representation election pursuant to the provisions of Section 8(b)(7)(C) of the National Labor Relations Act, has exceeded his authority under the Act, and has deprived the plaintiff herein of due process under the Constitution of the United States.

The plaintiff contends that in following the provisions of Section 8(b)(7)(C) defendant is required first to afford plaintiff union a hearing on the question of whether its picketing was prohibited by Section 8(b)(7), for such picketing must be determined to exist before the expedited election procedures provided in subparagraph (C) of 8(b)(7) can be invoked. In the instant case, after pickets appeared an unfair labor practice charge was filed against plaintiff union alleging violation by the union of the provisions of 8(b)(7). The employer, within a reasonable time after commencement of the picketing, filed herein a representation petition. After investigation by defendant, the defendant determined that an object of plaintiff's picketing was in fact recognition or organization in violation of Section 8(b)(7), and accordingly issued a notice of election to be held on March 14, 1960. It is plaintiff's contention, as stated above, that the Regional Director should hold a hearing before direction of an election in order to determine

whether or not the union had in fact engaged in conduct proscribed by 8(b)(7).

It is the opinion of this court that the plaintiff has failed to establish the jurisdiction of this court in that it fails to allege facts constituting a violation of the National Labor Relations Act or a deprivation of due process or a derogation of its right to free speech under the Constitution of the United States. Plaintiff's request for a preliminary injunction is Denied and the temporary restraining order heretofore issued is discharged. Defendant's motion to dismiss the complaint is Granted.

Defendant herein shall prepare findings of fact and conclusions of law.

Dated: March 23, 1960.

/s/ ALBERT C. WOLLENBERG,
U. S. District Judge.

[Endorsed]: Filed March 23, 1960.

Appendix B

STATUTORY PROVISIONS INVOLVED

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof:

Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

Section 8(b)(7), National Labor Relations Act, as amended, 1959

* * * * * * *

10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby

was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, sees. 723-B, 723-C).

10(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may

be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period; Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and pre-

sent any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officer or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

Sections 10(b) and 10(l), National Labor Relations Act, as amended, 1959

* * * * * * *

(d) Section 10(l) of the National Labor relations Act, as amended, is amended by adding after the words "section 8(b)," the words "or section 8(e) or section 8(b)(7)," and by striking out the period at the end of the third sentence and inserting in lieu thereof a colon and the following: "Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue."

Section 704(d), Labor-Management Reporting and Disclosure Act of 1959

Appendix C

Mr. Kennedy. "Under our substitute if the result of the picketing is to deny the entry of goods—in other words, if the Teamsters say, 'Sign up or you will not get any goods,' an early election may be obtained by an employer—a right he does not have today. If the union loses the election, the picketing must cease.

"Under our substitute proposal organizational picketing can take place only under limited conditions. All are in our opinion most fair and equitable.

"First. A union may use pickets in an effort to organize until there is an election in which the NLRB can determine the employees' wishes. But a union which is stopping truck deliveries or other employees would not be allowed to avoid an election.

"Second. Picketing, in the absence of a contract or an election, which has only the effect of notifying the public of non-union conditions, and asking the employees to join the union would not be banned."

105 *Daily Congressional Record*, 15900

Mr. Goldwater. "The second proviso to the third prohibited provision grants the following exemption from said third prohibition only—and not from the first two:

"Where the union engages in picketing or other publicity for the sole purpose of truthfully advising the public that an employer does not employ members

of or have a contract with a labor union. In those circumstances, such picketing may be carried on indefinitely. However, if one of the effects of such exempted picketing is to induce any individual employed by any other person—other than the picketed employer—in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services, and a reasonable period—not longer than 30 days—has elapsed since such picketing began, and regardless of whether it has ceased thereafter and not been resumed, the employer may file a petition pursuant to which the Board shall conduct an election . . ."

105 *Daily Congressional Record*, A8524-8525